Supreme Court, U.S.
FILED
DEC 16 1999
CLERK

No. 99-792

IN THE
Supreme Court of the United States

NVR HOMES, INC.,
Petitioner,

v.

CLERKS OF THE CIRCUIT COURTS FOR ANNE ARUNDEL COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

JAMES M. SACK
SACK & ASSOCIATES
8300 Greensboro Drive
Suite 1080
McLean, VA 22102
(703) 883-0102

ALLAN P. HILLMAN
NEUBERGER, QUINN, GIELEN RUBIN & GIBBER, P.A.
One South Street
Baltimore, Maryland 21202
(410) 332-8542

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

ARNOLD M. WEINER
SNYDER, WEINER, WELTCHEK, VOGELSTEIN & BROWN
1829 Reisterstown Road
Baltimore, Maryland 21208
(410) 653-3700

* Counsel of Record
Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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INTRODUCTION

Respondents' Brief in Opposition ("Opp.") fails to confront the questions presented by the Petition. One reading the brief without reference to the Petition would hardly know that the first question presented is whether NVR's effort to gain a declaration as to the meaning of its bankruptcy plan constituted a "suit" against the states within the meaning of the Eleventh Amendment. Nor would it be clear that NVR did not initiate an adversary proceeding and sought no money judgment from the states. Only by attempting to change the way this case comes to the Court can respondents undermine the demonstration in the Petition that review is warranted. Focusing on the

actual facts and questions presented confirms that the important and recurring issues raised by the Petition merit review.

ARGUMENT

1. Respondents' primary contention is that "the first issue raised in the petition" was not argued below. Opp. 4. It is quite clear, however, that the first question presented —involving which bankruptcy proceedings constitute "suit[s] * ** * against one of the United States" within the meaning of the Eleventh Amendment, *see* Pet. i—was both raised and resolved in the courts below. *See, e.g.*, Pet. App. 17a ("we are left to decide whether the case before us is a suit against the state tax authorities"); Pet. App. 40a (question presented in district court is "whether debtor's initiation of a contested matter * * * constituted a 'suit' for Eleventh Amendment purposes"). Respondents' waiver claim rests on a misstatement of the question presented. While we did observe that this case provides the Court with an opportunity to consider the constitutionality of 11 U.S.C. § 106(a), we urged the Court to grant review of "a preliminary question independently meriting this Court's review"—the "suit" question. Pet. 14-15. That question was both pressed and passed upon in the courts below.[1]

2. When respondents turn to the question that was presented by the Petition, they simply repeat the mischaracterization of NVR's action on which the Fourth Circuit decision rested. As we explained, *see* Pet. 21,

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[1] Contrary to respondents' contention, moreover, this Court may use this case as the vehicle to decide the constitutionality of 11 U.S.C. § 106(a) if it so chooses. That issue *was* "resolved in the lower court," *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted), when the Fourth Circuit relied on its earlier decisions holding that § 106(a) was unconstitutional. *See* Pet. App. 13a.

nothing in NVR's motion asked the bankruptcy court to " 'raid Maryland's and Pennsylvania's treasuries.' " Opp. 5 (quoting Pet. App. 22a). Had NVR pursued such an action in federal court—through, for example, an adversary proceeding asking the court to order a refund—the cases on which respondents rely might well be relevant. *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974) (decree which "requires payment of state funds * * * as a form of compensation" invalid under Eleventh Amendment). Thus, it is not at all surprising that "NVR does not cite a single bankruptcy case in which a court has held that the Eleventh Amendment is inapplicable to an order that would require a State to refund taxes or other monies," Opp. 6, or that the cases on which NVR does rely did not involve "attempt[s] to secure a federal court order requiring a State to pay funds out [of] its treasury to a debtor or another party." *Id.* at 8. NVR sought no such order from the bankruptcy court below.

Instead, NVR sought a declaration from the bankruptcy court about the meaning and scope of the bankruptcy plan of reorganization. Relying on *Green v. Mansour*, 474 U.S. 64 (1985), respondents assert that such declaratory relief would either be meaningless or, if not meaningless, invalid under the Eleventh Amendment. This argument presents a false dichotomy, and ignores the context in which the question arises. The issue in *Green*, and in the cases on which it relied, was whether an independent declaratory judgment action could be maintained when its only effect would be to require payment of funds from the state treasury. *See id.* at 73. Here, by contrast, the "suit" issue arises not where a federal court is being asked to consider a free-standing declaratory judgment action but rather is exercising its well-established power to interpret its own decrees and orders. *See Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239-240 (1934). And it is not

at all clear that its interpretation—if it adopted NVR's view of the plan—would, as was the case in *Green*, "leav[e] to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." 474 U.S. at 73. On the contrary, the states would retain all defenses to the refund actions that they would otherwise have, but would be bound to honor the federal bankruptcy court's interpretation of its own decree. The declaration sought by NVR is therefore neither meaningless nor the final word on refunds, but simply an exercise of the federal court's power to construe its own decrees.

3. While respondents voluntarily appeared in the proceedings below in an attempt to secure a favorable interpretation of the bankruptcy decrees, the proceeding NVR initiated involved no process issued to the states or coercion of state entities to appear. *See* Pet. App. 19a. As we observed in the Petition, Pet. 20-21, "the very object and purpose" of the Eleventh Amendment was to preclude coercive actions against the states in federal court, *see In re Ayers*, 123 U.S. 443, 505 (1887)—an issue that is simply not presented here. Rather than provide an answer to this fundamental deficiency of their Eleventh Amendment defense, respondents simply choose to ignore "the very object and purpose" of the provision on which they rely. Nothing in the Opposition comes to grips with the absence of coercion, or deals with the demonstrated conflict among the lower courts on whether proceedings that are not coercive actions against the states constitute a "suit * * * against one of the United States" under the Eleventh Amendment. *See* Pet. 15-20.

The absence of coercion was found to be significant on the "suit" question in the bankruptcy context in *Virginia* v. *Collins (In re Collins)*, 173 F.3d 924 (4th Cir. 1999),

pet. for cert. filed, 68 U.S.L.W. 3153 (U.S. Aug. 31, 1999) (No. 99-380). As the United States has recognized in its Brief in Opposition in *Collins* (filed Dec. 1, 1999), the proceeding at issue there "had none of the characteristics of a suit against a State, and the Eleventh Amendment * * * was not implicated" because the state, although "served with a copy of respondents' motion, * * * was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court." Brief for the United States in Opposition at 4, 5. *See also id.* at 5 (citing *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996)); *New York* v. *Irving Trust Co.*, 288 U.S. 329, 333 (1933) (quoted at Pet. 22). So too here. Yet the Fourth Circuit reached a completely different result below, contrary not only to its own earlier decisions but also to many other decisions—such as *Texas* v. *Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999)—finding that bankruptcy proceedings short of adversary proceedings do *not* constitute suits against the states under the Eleventh Amendment. *See* Pet. 16-19.

4. Respondents attempt to dismiss their own support for this Court's review of the "suit" question in *Collins* by suggesting that "NVR acknowledges" that the *Collins* case arises in a "different procedural setting." Opp. 8 (quoting Pet. 17). What NVR in fact said in explaining the Fourth Circuit's Eleventh Amendment decisions, Pet. 16-17, is that *Collins* arose "in a slightly different procedural setting" from the Fourth Circuit's earlier cases. That is hardly the "acknowledge[ment]" respondents would have it be; indeed, the state petitioner in *Collins* itself recognizes that the cases "raise[] the identical issue." Reply Brief of the Petitioner in *Collins*, at 4 (filed Dec. 14, 1999). In any event, the "suit" issue presented in *Collins* and in this case cannot be dismissed by fine dissection of

the variety of procedural postures in which it might arise. Instead, as the respondent-supported petition in *Collins* acknowledged, there is "continuing confusion over the scope of the application of the Eleventh Amendment to bankruptcy" which "serves the interests of no one." *Collins* Pet. 23. While that confusion does arise in a variety of procedural settings, this Court's explication of the factors to be considered when resolving the "suit" question in the bankruptcy context would eliminate confusion across the board.

5. With respect to the second question presented, respondents contend that the decision below does not conflict with the Second Circuit's decision in *City of New York* v. *Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.)*, 758 F.2d 840 (2d Cir. 1985), because the transfer in that case occurred after the confirmation of the plan. Opp. 9. As we explained, however, the *Jacoby-Bender* court held that a transfer is "under a plan confirmed" where—as here—it is "necessary to the consummation of a plan." 758 F.2d at 841. *See* Pet. 24-25. Respondents have nothing to say about the numerous lower court decisions applying the *Jacoby-Bender* test and holding *pre*-confirmation transfers exempt under § 1146(c), because they were "necessary to the consummation of a plan," or the conflict the Fourth Circuit's decision creates with those decisions. *See* Pet. 24, 26-27.

Respondents also contend (Opp. 9) that the Fourth Circuit did not reject *Jacoby-Bender* because the court stated that it did not "take issue with the Second Circuit's logic." Pet. App. 25a. But, as we explained, the *Jacoby-Bender* test applies just as readily to the facts of this case as it did to those before the Second Circuit. Pet. 26. Nevertheless, the Fourth Circuit determined that it would not apply that test as bankruptcy courts throughout the

Second Circuit and elsewhere have applied it. Pet. App. 26a; *see* Pet. 25-27. That conflict warrants this Court's review.

6. In attempting to defend the Fourth Circuit's interpretation of § 1146(c), respondents merely track the Fourth Circuit's misguided reasoning. Opp. 10. We explained why the Fourth Circuit's interpretation was flawed, and that—under the correct reading of the statute—the transfers at issue were clearly made "under a plan confirmed." Pet. 27-29. Respondents say nothing about the bankruptcy policy served by that reading or the support it finds in the legislative history of the exemption. *See* Pet. 28-29.

7. Respondents also suggest that the transfers at issue cannot have been made "under a plan confirmed" because the plan contains no reference to them. Opp. 10. As the Second Circuit explained in *Jacoby-Bender,* however, "[t]hat the plan did not empower the debtor to make a specific sale or deliver a specific deed is *irrelevant* to [a] determination that the delivery of the deed took place 'under' the plan within the meaning of section 1146(c)." 758 F.2d at 841 (emphasis added). Respondents' suggestion thus simply highlights the conflict between the decision below and *Jacoby-Bender.*

8. Respondents do not contend that the issues are not important or recurring, and no such contention would be plausible. As the Petition demonstrates, multiple proceedings in bankruptcy courts implicate the questions of what constitutes a "suit" within the meaning of the Eleventh Amendment and the proper interpretation of 11 U.S.C. § 1146(c). These questions merit this Court's review.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES M. SACK
SACK & ASSOCIATES
8300 Greensboro Drive
Suite 1080
McLean, VA 22102
(703) 883-0102

ALLAN P. HILLMAN
NEUBERGER, QUINN, GIELEN
RUBIN & GIBBER, P.A.
One South Street
Baltimore, Maryland 21202
(410) 332-8542

* Counsel of Record

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
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ARNOLD M. WEINER
SNYDER, WEINER, WELTCHEK,
VOGELSTEIN & BROWN
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Baltimore, Maryland 21208
(410) 653-3700

Counsel for Petitioner